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Mr. Horst Greczmiel
Associate Director for NEPA Oversight
Council on Environmental Quality
722 Jackson Place
Washington, DC 20503

Submitted via email to: hgreczmiel@ceq.eop.gov

Re: CEQ Review of MMS NEPA Policies, Practices, and Procedures

Dear Mr. Greczmiel:

We are writing on behalf of Defenders of Wildlife and the Southern Environmental Law Center to offer comments for CEQ's 30-day review of the Minerals Management Service's ("MMS") National Environmental Policy Act ("NEPA") policies, practices, and procedures for Outer Continental Shelf ("OCS") oil and gas exploration and development. 75 Fed. Reg. 29996 (May 28, 2010).

The Outer Continental Shelf Lands Act ("OCSLA") establishes a four-stage process for oil and gas activities: five-year programmatic plans; lease sales; exploration plans; and extraction activities. These four stages of planning, leasing, exploration, and production all involve "major Federal actions significantly affecting the quality of the human environment" and, accordingly, fall within the requirements of section 102(c) of NEPA, 42 U.S.C. § 4332(c). We have serious concerns about MMS's implementation of NEPA and its consistent failure to comply with the Act's requirement that the Service develop a "detailed statement" documenting projects' environmental impacts, alternatives considered, and an evaluation of the long-term costs of short-term uses of natural resources. 42 U.S.C. § 4332. Our concerns arise from the Service's failure to conduct site-specific environmental review for many oil exploration and development activities on the OCS, as well as its adoption of departmental policy guidelines that discourage the Service from taking the requisite "hard look" at the consequences of OCS drilling. The Ninth Circuit has observed that "NEPA applies to all stages of the OCSLA cycle," *Vill. of False Pass v. Clark*, 733 F.2d 605, 614 (9th Cir. 1984), and we encourage CEQ to guide MMS in adopting policies consistent with this objective.

Offshore drilling is an inherently risky business. While this has been made apparent most recently with the explosion of BP's Deepwater Horizon rig, crude oil exploration and extraction has a long history of environmental casualties. Disastrous events punctuate the history of offshore drilling, from the 1979 blow-out of the Ixtoc 1, which spilled more than 140 million gallons of oil off of the coast of Mexico, to the 2009 Montara blow-out, which spilled more than 1.2 million gallons of oil in Australian waters over a two and a half month period.

The potential magnitude of the environmental harm associated with oil and natural gas drilling operations, both exploratory and extractive, is enormous. The chilling photographs of dead marine life mired in oil illustrate only a fragment of the ecological devastation associated with oil spills like the Deepwater Horizon release. Yet despite the magnitude of the ecological and economic values at stake, MMS has consistently disregarded its responsibility to ensure thorough environmental review. Most notably, MMS has made improper use of categorical exclusions ("CE") and has abused the concept of

“tiering.” The Service consistently invokes these conventions and defers to industrial assurances of environmental stewardship rather than undertaking its own searching environmental analyses as NEPA requires.

We urge CEQ to take this opportunity to ensure that MMS (and its successor agency or agencies) develops and adheres to the procedures and policies that ensure the proper application of NEPA in both letter and spirit. We further encourage CEQ to oversee and carefully scrutinize the adoption of the Service’s NEPA implementing procedures, in light of CEQ’s responsibility to “review and appraise” federal programs, 42 U.S.C. § 4344(3); and to ensure that MMS adopts methods which will ensure that environmental resources are “given appropriate consideration in decision making.” 42 U.S.C. § 4332(b). Specifically, we encourage CEQ to require MMS to comply with NEPA by engaging in a meaningful environmental review at each of OCSLA’s four stages.

I. INTRODUCTION

Existing CEQ regulations provide MMS with the procedural tools to comply with NEPA and, accordingly, CEQ should focus its attention on clarifying existing guidance to promote compliance by MMS in the specific contexts in which it works. Indeed, although fundamental reforms of OCS policy are rightfully being considered by Congress and the Department of Interior, we believe that significant benefits for our coastal and marine natural resources can be achieved simply through compliance with existing law.¹

II. RECOMMENDATIONS

1. Tiering under NEPA

Policy guidance should specify in detail the circumstances in which MMS may rely on tiering for its NEPA analyses. While the four-stage OCSLA process allows for meaningful environmental review and compliance with NEPA at each stage of the OCSLA process, MMS’s misuse of tiering has caused the Service to bypass the requisite analyses. In particular, the programmatic and leasing stages receive broad and general treatment on promises that more detailed analysis will be conducted for exploration and development, yet this detailed analysis never actually occurs. Instead, MMS most often simply reiterates conclusions drawn from the overly general reviews conducted during the five-year planning and lease sale stages or relies on these documents to exclude exploration and development from environmental review altogether. This approach undermines the objectives of NEPA and leaves MMS blind to potential impacts, as well as available alternatives and mitigation measures. As the Ninth Circuit has noted, MMS “may not hide behind the cloak of its generalized multi-sale [Environmental Impact Statement]” because “NEPA applies to all stages of the OCSLA cycle. When the agency is tasked with assessing the environmental impacts of a particular exploration plan, it has a duty to take a hard look at the consequences of drilling in specific sites....” *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 825 (9th Cir. 2008), *withdrawn*, 559 F.3d 916 (9th Cir. 2009), *dismissed as moot*, 571 F.3d 859 (9th Cir. 2008).

¹ Notwithstanding the above, OCSLA is fundamentally at odds with ensuring meaningful environmental review and scientifically informed decision-making. The statute prioritizes oil and gas development over environmental protection and requires the government to compensate a lessee if drilling or production is not allowed due to safety or environmental concerns. To be sure, stringent compliance with NEPA will significantly improve the degree to which environmental concerns are properly considered in offshore oil and gas development but reforms to the current system are necessary. We encourage CEQ to recognize in its report that improvements in NEPA compliance can only improve the existing system so much and that a broader review and reform of the current approach to offshore drilling is in order.

NEPA requires that MMS include in its environmental review consideration of alternatives to the proposed action; cumulative impact analysis of past, present, and reasonably foreseeable future actions; consequences of low-probability, high-impact events such as catastrophic oil spills, and capacity to respond to them; mitigation measures; site-specific conditions at a scale appropriate to each stage; and consideration of all relevant information that has become available since the Service's environmental review for the preceding stage of the process.

At the five-year planning stage, in which the agency makes nationwide decisions about where and when lease sales and subsequent drilling will occur, a full Environmental Impact Statement ("EIS") is required that considers not only alternative locations for drilling, but also alternatives to drilling that may have less harmful environmental impacts such as greenhouse gas emissions that cause global warming and ocean acidification as well as less risks of direct harm to the marine and coastal environments. More important than the specific type of document, however, is the strength of the analysis, which must actually grapple with the full environmental impacts of various alternatives. This type of analysis has most often been missing from MMS documents, whether they be EISs, Environmental assessments ("EAs"), or the CEs that have received so much attention. If the proper analysis is included, tiering may be used to avoid unnecessary repetition in documents and get to more specific levels of analysis that are appropriate for the later stages of the OCSLA process. It is our position that, at the exploration and production stages, an EIS should be prepared where exploratory drilling is to take place in previously undeveloped areas, where unconventional techniques are to be employed, or where significant new information or circumstances have come to light. An EA may be appropriate at these stages where these circumstances do not exist. CEs are not appropriate for any stage of the OCS development process, as we discuss further below.

2. Categorical Exclusions under NEPA

CEQ should clarify categorical exclusion review (CER) to guide MMS in complying with NEPA by acknowledging that the use of categorical exclusions to authorize activities at any stage of the OCSLA process is improper under existing law. Categorical exclusions are applicable only to "actions which do not individually or cumulatively have a significant effect on the human environment..." 40 C.F.R. § 1508.4. Even in the absence of a catastrophic event such as an oil spill, the impacts associated with normal drilling operations include noise, air, and water pollution, as well as seismic disturbance and increased vessel and air traffic. Accordingly, their impacts—both individual and cumulative—on the human environment are indisputably significant.

a. Compliance with Department of the Interior Regulations

CEQ should recommend that MMS remove from its manual ("Manual") the categorical exclusion for the approval of exploration plans, consistent with Department of the Interior ("DOI") regulations. DOI has promulgated detailed regulations that list the actions which qualify for categorical exclusions from NEPA review. *See* 43 C.F.R. § 46.210. The categorical exclusions established in these regulations cover routine administrative, financial, legal, and operational actions of the Department which have no significant environmental impacts. The regulations do not allow for any categorical exclusions for activities related to OCS leasing, sale, or development, or any other actions with significant environmental impacts. The regulations do not provide agencies of the Department such as MMS with discretion to adopt additional categorical exclusions for activities that would have more than an insignificant environmental impact. Yet in the Manual, MMS has adopted additional categorical exclusions covering "[a]pproval of offshore geological and geophysical mineral exploration activities[.]" "[a]pproval of an offshore lease or unit exploration, development/production plan...in the central or western Gulf of Mexico" and other categorical exclusions that go beyond activities that could be

authorized by Department regulations. Manual at 15.4(C)(10). The categorical exclusions contained in the Manual are outside of the scope of categorical exclusions authorized by 43 C.F.R. § 46.210, and as exemplified by the significant and ongoing environmental impacts from the Deepwater Horizon spill, authorize exclusions for actions which can have a significant impact on the human environment. MMS has thus violated the law in adopting categorical exclusions in its Manual which are inconsistent with NEPA and the Service's own regulations. See 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1501.4, 1508.4.

MMS's actions following the Deepwater Horizon blowout and spill illustrate the Service's abuse of categorical exclusions, and further demonstrate that MMS's noncompliance with the law lies at the heart of the failures that led to the disaster. Following the Deepwater Horizon explosion, MMS continued to grant CEs for exploration wells and drilling operations in the Gulf of Mexico, with over fifteen of these exclusions covering wells and operations in waters defined as "deepwater" by MMS. The Service granted these exclusions from NEPA analysis despite the ongoing environmental harm caused by the Deepwater Horizon spill, and without any explanation of how the actions authorized would not individually or cumulatively have a significant effect on the environment. In violation of its own departmental Manual, MMS granted these exemptions despite the fact that the wells and operations would potentially be in "relatively untested deepwater, or remote areas...; or within the boundary of a proposed or established marine sanctuary, and/or within or near the boundary of a proposed or established wildlife refuge or areas of high biological sensitivity; or...utilizing new or unusual technology." Manual at 15.4(C)(10). MMS also failed to explain how, in light of new information regarding potential environmental impacts as a result of the Deepwater Horizon spill, "extraordinary circumstances" did not preclude the application of CEs to any of these newly authorized exploration plans. See *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1096 (11th Cir. 2004) (holding that "[a]t a minimum, the agency should have recognized that these exceptions 'may' apply" and considered their application). In light of this clear abuse of CEs, CEQ should recommend that MMS discontinue its unsupported reliance on these exclusions and act in accordance with the existing regulatory language, departmental guidance, and case law which the Service has long ignored in order to avoid undertaking the thorough environmental review that NEPA demands. See *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986) ("An agency cannot...avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment...[T]he Service, in issuing the permit, provided no reasoned explanation—indeed, no explanation at all—of how these conditions would prevent application of an exception to the categorical exclusions.").

b. Transparency and Public Participation

MMS's reliance on categorical exclusions for OCS exploratory and extractive oil and natural gas operations is inconsistent with NEPA's emphasis on public participation, which in turn undermines the Act's goal of promoting informed decision-making. To help ensure that MMS is not abusing categorical exclusions, its processes for adopting and applying CEs should be both transparent and open to public participation. In addition to removing from its Manual all CEs for exploratory and production drilling activities, MMS should also re-evaluate and publish for notice and comment any remaining or new CEs. Moving forward, where MMS plans to rely on a CE, it should clearly document that it has made a CE determination, and briefly state why the facts of a particular action qualify for a CE and are subject to no extraordinary circumstances that would preclude its use. As CEQ recommends in its draft guidance, MMS should post these determinations on its website and otherwise make them available to the public to increase transparency in their decisionmaking when they use CEs. This move towards greater transparency has already been adopted by some agencies; for example, the Department of Homeland Security posted all comment letters received on their draft management directive for implementing NEPA procedures on their website: http://www.dhs.gov/xabout/laws/editorial_0489.shtm.

3. Risk Analysis

a. Avoiding Speculation

MMS's failure to develop predictions in its environmental reviews according to peer-reviewed science and accepted data, and its potentially devastating consequences, were clearly illustrated by the catastrophic Deepwater Horizon blowout and its aftermath. In April 2007, MMS issued its final EIS ("Multisale EIS") for eleven lease sales including Lease Sale 206, in which it explained that an oil spill would only be likely to "result in sublethal impacts" to marine mammal and sea turtle species present in the Gulf of Mexico. Multisale EIS at 2-37-38. MMS reached a similar conclusion with respect to the region's bird populations, finding that "[t]he majority of effects resulting from a proposed action...on endangered/threatened and nonendangered/nonthreatened coastal and marine birds are expected to be sublethal: behavioral effects, sublethal exposure to or intake of OCS-related contaminants or discarded debris, temporary disturbances, and displacement of localized groups from impacted habitats." *Id.* at 2-39. With respect to fish species inhabiting the Gulf, MMS concluded that the effects of an oil spill on fish populations and the commercial fishing industry would be "negligible and indistinguishable from variations due to natural causes." *Id.* at 2-40. The Service further explained that "[a] subsurface blowout would have a negligible effect on GOM fish resources or commercial fishing. If spills due to a proposed action were to occur in open waters of the OCS proximate to mobile adult finfish or shellfish, the effects would likely be nonfatal..." *Id.* Accordingly, MMS concluded, "[t]he effect of proposed action-related oil spills on fish resources and commercial fishing is expected to cause less than a 1 percent decrease in standing stocks of any population, commercial fishing efforts, landings, or value of those landings." *Id.* In sharp contrast to these inadequately supported predictions, NOAA had closed 54,096 square miles in the Gulf of Mexico—approximately 22% of the federally managed waters of the Gulf Exclusive Economic Zone—to commercial and recreational fishing as of May 25, 2010, and certain state-managed waters have been closed to fishing as well. *See* CONG. RES. SERV., DEEPWATER HORIZON OIL SPILL: SELECTED ISSUES FOR CONGRESS 17 (2010). Tourism has been similarly harmed, and "it is likely that the greatest impacts have not yet surfaced and may occur over years." *Id.*

These glaring analytical failures now vividly on display make clear that MMS needs guidance on quality of information and risk analysis it employs. CEQ should reinforce MMS's obligation to develop its environmental reviews in reliance on the best available data, including, to the extent possible, on well-documented, peer reviewed data and models. Bald speculation that harmful environmental impacts will be non-existent or minimal have no place in NEPA analysis, and indeed, is exactly what the "hard look" required by NEPA is intended to avoid. The Service may not substitute its own conjecture for comprehensive, science-based review.

b. Analysis of Low-probability Events

Perhaps the most significant lesson from the Deepwater Horizon disaster, with respect to environmental review, has been the importance of including in impact statements consideration of low-probability, high-impact events. In the Multisale EIS for Lease Sale 206, MMS repeatedly relied on the relatively low probability of a major oil spill, which it defined as a spill of 1,000 or more barrels, to circumvent the thorough environmental analyses required by NEPA. With respect to six species of threatened and endangered Alabama beach mice, for instance, MMS explained that "[g]iven the low probability of a major ($\geq 1,000$ bbl) spill occurring, direct impacts of oil spills on beach mice from a proposed action are highly unlikely." *Id.* at 2-39. Similarly, when discussing potential impacts to endangered Gulf sturgeon from an oil spill, MMS noted that "[t]he likelihood of spill occurrence and subsequent contact with, or impact to, Gulf sturgeon and/or designated critical habitat is extremely low." *Id.* at 2-40. MMS estimated that over the forty-year life span of the eleven proposed lease sales, the total amount of oil spilled in the offshore waters of the Central Planning area, which includes the Deepwater

Horizon site, would be 5,500 to 26,500 barrels of oil. Multisale EIS at 4-241. The maximum amount estimated—26,500 barrels—is slightly over 1 million gallons, a fraction of the current estimate of oil spilled at the Deepwater Horizon site.

CEQ should advise MMS that, in order to comply with its obligations under NEPA, it must include in its environmental analyses thorough risk analysis, including evidence-based evaluation of blowout and oil spill risks and the Service's capacity to respond to a large spill. Such analysis should be undertaken at all stages of the OCSLA process, and should account for events that would have catastrophic impacts even where those events are viewed as highly improbable. MMS should acknowledge and thoroughly assess worst-case scenarios and should consult with other natural resources agencies to develop and evaluate its approach to risk analysis. This analysis should be integrated into environmental reviews for each of the four stages of the OCSLA process, and should encompass potentially catastrophic occurrences, as well as the response measures that such circumstances would necessitate (e.g., include in oil spill risk analysis a parallel evaluation of dispersant use and other environmentally significant response measures).

c. Independent Review

Compounding the problems created by flawed data and insufficient impacts analysis in the Multisale EIS was MMS's willingness to rely on BP's environmental analysis to frame its own review. BP's exploration plan ("Deepwater Horizon EP") for the Deepwater Horizon site, which was submitted to MMS for review on March 10, 2009, relied on the low probability of a large spill to avoid addressing the potentially catastrophic impacts of such an event—and the Multisale EIS, in turn, relied on BP's assessment. In the EP, BP asserted that it did "not anticipate that any protected species might be incidentally taken during operations proposed in this plan." Deepwater Horizon EP at 8-1. BP also predicted that the worst case scenario for an oil spill from an uncontrolled blowout was 162,000 gallons of crude oil per day. *See Id.* at 7-1. The EP noted that accidental oil spills could have adverse impacts on protected species and critical habitat in the area. *See, e.g., Id.* at 14-3 ("Oil spills and oil spill response activities are potential threats that could have lethal effects on turtles."). Nevertheless, it anticipated that there would be no such impacts because "it is unlikely that an accidental surface or subsurface oil spill would occur from the proposed activities." *Id.* at 14-3 to 14-6. Having dismissed the possibility of a spill, BP explained that "[n]o agencies or persons were consulted regarding potential impacts associated with the proposed activities" and "[n]o mitigation measures other than those required by regulation and BP policy will be employed to avoid, diminish, or eliminate potential impacts on environmental resources." *Id.* at 14-12.

CEQ should emphasize that MMS is obligated to undertake independent environmental analyses, and may not rely on conclusions set forth by parties interested in the outcome of the review process. To ignore this requirement undermines the fundamental objectives of NEPA.

4. Mitigation

CEQ regulations require that environmental analyses include an evaluation of available mitigation measures, yet oil spill response has not usually been part of this analysis for OCS activities. CEQ should recommend that MMS include a peer-reviewed oil spill containment and cleanup strategy in each impact statement, and include enforceable mitigation standards in permits where the Service relies on proposed mitigation to support its issuance of FONSI. Only enforceable mitigation measures should be used to support a FONSI, and the Service should provide for public notice and comment prior to concluding a FONSI for which mitigation is the asserted justification.

5. Incomplete Information

MMS frequently notes the uncertain or incomplete nature of certain information in its environmental analyses, particularly in EAs drafted at the lease sale stage of the OCSLA process, yet fails to comply with existing CEQ regulations which dictate how agencies are to address data gaps. If MMS does not have data necessary to complete a comprehensive environmental review, it must obtain it, and if it cannot access that information it must address in clear terms whether and how existing data gaps will be filled. *See* 40 C.F.R. § 1502.22. Where data is unavailable, the Service should respond to the resulting uncertainty by adopting a particularly cautious approach in its reviews—especially where there are many unknowns with respect to baseline condition and potential environmental impacts, as in the Arctic, in frontier OCS regions, or in deepwater settings. CEQ should emphasize that insufficiency of information—whether it results from MMS’s failure to collect relevant data or its inability to obtain it—cannot justify inadequate or incomplete analysis.

6. Time for Environmental Review

CEQ should clarify the relationship between MMS’s obligations under NEPA and deadlines established by OCSLA. MMS has relied on OCSLA’s requirement that it “approve [exploration] plan[s], as submitted or modified, within thirty days of [] submission” to excuse its noncompliance with NEPA’s requirements. 43 U.S.C. § 1340(c)(1). CEQ should provide guidance that explicitly reconciles the statutory deadline with MMS’s obligation to undertake complete environmental analysis and provide an opportunity for public comment before finding that an EP is submitted and the thirty-day period has begun.

The Ninth Circuit addressed this matter in *Alaska Wilderness League v. Kempthorne*, in which the court found that MMS had improperly failed to prepare an EIS to evaluate the impacts of an OCS exploration plan (“EP”), rejecting MMS’s defense that OCSLA’s thirty day limitation precluded extensive environmental review. 548 F.3d at 834 (citations omitted). The Court conceded that “[t]he agency may be correct that it is difficult for an agency to conduct a full EIS in only thirty days,” but found unpersuasive the Service’s argument that OCSLA’s thirty day constraint precluded preparation of a comprehensive EIS. This conclusion, according to the court, is supported by the fact that

[t]here is flexibility built into the regulatory scheme so that the agency can perform its full duties under NEPA. The thirty-day clock begins to run only when an exploration plan is deemed complete. If the agency is able to identify gaps before that point, then it can request that information be added before the proposal is finalized. Additionally, at the end of the thirty-day review period, the agency may opt to require modifications to an EP if there are concerns that it does not comport with environmental standards. These options give the agency additional time to consider a plan and compile an environmental impact statement, if necessary.

Id. (citing 30 C.F.R. §§ 250.231(b), 250.233(a)-(b)). Accordingly, the court concluded, “[t]o say simply that the agency only has thirty days to complete a full EIS is misleading.” *Id.* CEQ should provide guidance to the effect that MMS is not bound by statutory deadlines that constrain its ability to complete environmental reviews as mandated by NEPA.

7. Compliance with Other Environmental Laws

CEQ regulations specify that, “[t]o the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by...the Endangered Species Act of 1973 and other

environmental review laws and executive orders.” 40 C.F.R. § 1502.25(a) (citation omitted). MMS has consistently ignored this obligation, regularly assuming compliance with those laws in its evaluations of whether significant impacts will occur as the result of proposed actions. As a result, the Service omits from those environmental analyses impacts that fall within the scope of the environmental statutes. CEQ should clarify MMS’s obligation to give meaningful consideration to the need for compliance with other environmental laws and regulations during its environmental review process.

III. CONCLUSION

Thank you for the opportunity to comment on the pressing matter of MMS’s policies, practices, and procedures for compliance with NEPA. It is imperative that MMS be compelled to conduct environmental reviews consistent with NEPA’s standards and accompanying regulations. The Deepwater Horizon disaster illustrates the tragic implications of the Service’s disregard for the law, and the underlying failures must not be repeated. We appreciate your thoughtful consideration of these comments.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Sierra Weaver", with a stylized, flowing script.

Sierra Weaver, Staff Attorney
Carson Barylak, Summer Associate
Defenders of Wildlife